Supreme Court, U.S.
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No. 99-3

IN THE
SUPREME COURT OF THE UNITED STATES

ACE AUTO BODY & TOWING, LTD.; ATLAM TOWING SERVICE, INC.; BANGS TOWING, INC.; BEN'S TOWING SERVICE; BILL'S TOWING SERVICE; BRAGG TOWING CO.; BROADWAY AUTO SERVICE, INC.; C & J COLLISION SERVICE, INC.; CHARLES SCHMIDT AND SONS, INC.; CHESTER'S HIGHWAY GARAGE OF PW, INC.; CK TOWING, INC.; DAVE'S HEAVY TOWING, INC.; DO-RITE RELIABLE TOWING, INC.; EFFICIENCY ENTERPRISE, INC.; EAST COAST INDUSTRIAL UNIFORM CORP.; EASTERN UNIFORM SERVICE CORP.; F & B TRUCK REPAIR & MAINTENANCE, INC.; GALASSO TRUCKING, INC.; GESCO ICE CREAM VENDING, CORP.; HENDRICKSON TOWING, INC.,; KENNY'S FLEET MAINTENANCE, INC.; LEONARD AUTOBODY; MARJAM SUPPLY CO.; INC.; MODEL TOWING & RECOVERY, INC.; MURRAY RUDE SERVICES, INC.; PARKVIEW TOWING CORP.; PLAZA AMBULETTE SERVICE, INC.; RAPID ARMORED CORPORATION; SUNNY DAY ENTERPRISE INDUSTRIES, LTD.; TOMMY BUG AUTO REPAIRS, INC.; ULTIMATE TRANSPORT, INC.; and ZANT PRE, INC., d/b/a Present Glass,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent..

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
ROBIN BINDER,
MORDECAI NEWMAN,
of Counsel.

*Attorney of Record
August 19, 1999

MICHAEL D. HESS,
Corporation Counsel of the
of the City of New York,
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 788-1025 or 1067

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COUNTER-QUESTIONS PRESENTED

1. Whether this Court, having already denied certiorari in a prior case where the City of Atlanta sought Supreme Court review based on the conflict between the Second and Eleventh Circuits as to whether the safety exemption in 49 USC § 14501(c) extends to municipalities, should, in the absence of any further relevant developments, deny the instant petition, which seeks certiorari based on the same conflict between the Second and Eleventh Circuits?

2. Whether the Second Circuit correctly found that New York City's statutory and regulatory provisions governing towing fall within the safety and financial responsibility exceptions to federal preemption under Title VI?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The New York City towing laws.

In this action, petitioners, who are comprised of a group of towing businesses, autobody repair shops, and trucking companies that regularly contract with towing companies, challenge the constitutionality of the regulatory scheme of the City of New York ("the City") governing municipal towing.

The statutes of this scheme are codified in the City Administrative Code ("Administrative Code"), Title 20, Chapter 2, Subchapter 31, §§ 20-495 to 20-598. Regulations implementing these laws have been promulgated by the City's Department of Consumer Affairs and codified in the Rules of the City of New York ("RCNY"), Title 6, Chapter 2, Subchapter EE, §§ 2-361 to 2-367.

Under this scheme, all tow truck businesses and operators must be licensed by the City's Department of Consumer Affairs. Administrative Code § 20-496. Towing ordinances also govern matters such as tow truck safety and record-keeping procedures, and prescribe maximum rates for towing and storage. *See* Administrative Code § 20-501, 20-503, 20-507; 6 RCNY §§ 2-363, 2-365.

In addition to general requirements, the governing laws establish an accident management program known as the Directed Accident Response Program ("DARP"). In order to eliminate "accident chasing," *i.e.*, towers' practice of racing through traffic to be the first at an accident site, DARP restricts the towing of certain disabled vehicles to program participants summoned to accident scenes by the City's Police Department. Administrative Code § 20-518; 6 RCNY 2-371. In addition, the statutory scheme authorizes the Rotation Tow Program ("ROTOW"), also created to maintain safety on the streets. ROTOW designates certain towers on a rotating basis to remove from the streets vehicles thought to be stolen or abandoned, and certain other unattended vehicles. Administrative Code § 20-519; 6 RCNY 2-372.

Petitioners claim that the regulatory scheme is preempted by 49 USC § 14501(c). That statute provides that a state or municipality "may not enact or enforce a law . . . related to a

price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 USC § 14501(c)(1).

The City counters that the regulatory scheme falls within the federal statute's stated exceptions for ordinances related to safety and financial responsibility. Under § 14501(c)(2)(A), the preemption of state and local regulation does not

> restrict the safety regulatory authority of a State with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to the minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Section 14501(c)(2)(C) provides that such preemption

> does not apply to the authority of a State or political subdivision of a State to enact or enforce a law . . . relating to the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

B. Procedural history of this case.

In August 1996, petitioners commenced the instant action in the United States District Court for the Southern District of New York, challenging the aforementioned regulatory scheme as preempted by Title VI. Shortly thereafter, petitioners moved for a preliminary injunction. Although the complaint sought a declaration and injunction as to substantially all of New York City's regulatory scheme, petitioners specifically limited their motion for a preliminary injunction to the DARP

program and a demonstration program called Special Accident Response Districts ("SARD"), which was then in effect.

In a memorandum opinion and order dated April 25, 1997, the District Court denied petitioners' preliminary injunction motion, having determined that, while Title VI generally applies to municipal towing regulation, the City's DARP and SARD programs would likely fall within the safety exception to Title VI preemption. 1997 U.S. Dist. LEXIS 5683 at 8.

Thereafter, petitioners and the City of New York each moved for summary judgment (A43, A274).[1] In support of its motion, the City argued that, except insofar as it prescribes a maximum rate for consensual towing[2] -- that is, for towing in situations not governed by DARP, SARD, or ROTOW, where the vehicle owner has a choice as to who will tow the vehicle and thus an opportunity to negotiate the towing price -- the City's towing scheme does not violate Title VI. The City contended that the statutory and regulatory provisions regarding towing "price, route or service" fall within the aforementioned exceptions to the federal prohibition, as they are either addressed to public safety, financial responsibility, or non-consensual towing rates.

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[1] Numbers in parentheses preceded by the letter A refer to pages of the Joint Appendix submitted to the Court of Appeals.

[2] With regard to its prescription of a maximum rate for towing not governed by DARP, SARD, or ROTOW, the City conceded that such regulation is preempted by Title VI. The City contended, however, that to the extent that it preempts municipal rate regulation with respect to consensual tows, Title VI violates the Commerce Clause. This argument was rejected by both the District Court and the Court of Appeals. The City seeks no further review of this issue.

By memorandum and decision and order (one paper) dated October 27, 1997, the District Court (Cote, J.) granted the City's motion for summary judgment, and denied that of petitioners, to the extent of finding that, with the exception of regulations addressed to rates for consensual tows, the City's scheme governing the towing industry is exempt from preemption under § 14501(c)(2) of Title VI (A379-409). 1997 U.S. Dist. LEXIS 16679.

Petitioners appealed to the Court of Appeals for the Second Circuit, after which the City cross-appealed.[3]

C. The Court of Appeals decision.

By judgment dated March 26, 1999, the Court of Appeals affirmed the decision of the District Court. 171 F3d 765 (1999). Finding that § 14501(c) does not preempt the City's laws applicable to nonconsensual towing, the Court stated that "the statutory text, Congress' aim to leave the states' residual control over safety and other local concerns, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned." *Id.* at 774.

Specifically, with regard to whether the DARP and ROTOW programs fall within the safety exemption, the Court rejected, as too narrow a reading of the federal law, petitioners' insistence "that the exemption extends only to

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[3] The cross-appeal sought review of the District Court's determination related to the constitutionality of the City's laws governing consensual towing. As already noted, this issue is unrelated to the instant petition for certiorari.

safety regulation of the mechanical components of motor vehicles. . . ." *Id.* Accordingly, by addressing the hazards posed by "chasing" and by the presence of abandoned vehicles in the streets, DARP and ROTOW fall fully within the ambit of the safety exemption.

Similarly, the Court found, the safety exemption covers the licensing and repair requirements in the City's scheme. As to the laws and regulations directed at storage and repair, the Court held that such provisions reasonably relate to safety concerns in that "a disabled motor vehicle clearly presents a safety hazard in a municipality where vehicular traffic is so heavy, and the City has an obligation to make arrangements for its removal from the road and to place it in safe-keeping." *Id.* at 777.

In addition, the Court found that the regulation of rates for nonconsensual towing falls squarely within the exemption created by "the plain language of § 14501(c)(20(C)[, which] clearly encompasses any tow 'performed without the prior consent or authorization of the owner or operator of the motor vehicle,' regardless of the reason for the lack of consent." *Id.* at 777-78.

Finally, the Court acknowledged that its holding with regard to the scope of the exemption is contrary to that of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F3d 538 (11th Cir. 1998), in which the Eleventh Circuit held that 14501(c)(2)(A) exempts only State regulatory authority and does not extend to municipalities or other political subdivisions. Arguing against the position adopted by the Eleventh Circuit, the Court stated, 171 F3d at 775-76:

. . . Granted, the text of 14501(c)(2)(A), unlike other subsections of 14501, fails to preserve explicitly the regulatory authority of the political subdivisions of the state. But we see no reason to construe this language to prevent the state from delegating its regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be "unaffected" by the preemption statute. . . .

Further, although the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. [Citation omitted.] To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries. . . .

RELEVANT PROVISIONS OF LAW

The federal statutory language at issue in this case is contained in 49 USC § 14501(c), which provides in pertinent part:

(1) Except as provided in paragraph (2) . . . a State, political subdivision of a State, . . . may not enact a law, regulation or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . with respect to the transportation of property.

(2) Matters not covered. - Paragraph (1) -

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, . . . or the authority of a State to regulate with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

* * * *

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

REASONS FOR DENYING THE WRIT

A. BY DECLINING TO GRANT CERTIORARI IN *R. MAYER OF ATLANTA V. CITY OF ATLANTA*, THIS COURT HAS ALREADY FOUND THAT THE CONFLICT BETWEEN THE SECOND AND ELEVENTH CIRCUITS IS AN INSUFFICIENT BASIS FOR SUPREME COURT REVIEW.

Petitioners argue that this Court should grant a writ of certiorari in order to resolve the split between the Second Circuit decision in this case and the decision of the Eleventh Circuit in *R. Mayer of Atlanta v. City of Atlanta,* 158 F3d 538 (11th Cir. 1998). The Eleventh Circuit held in *Mayer* that the safety exemption in § 14501(c)(2)(A) applies only to the State

itself and does not extend to municipalities or other political subdivisions. *Id.* at 545. In the instant case, the Second Circuit explicitly rejected the Eleventh Circuit's holding, and upheld those provision of the City's regulatory scheme directed at ensuring that towing is carried out safely. 171 F3d at 775-76.

This dispute between two judicial circuits is not in itself sufficient to warrant Supreme Court review of this case. Although Rule 10 of the Rules of the Supreme Courts lists a conflict between courts of appeal as one of the relevant considerations in determining whether to grant certiorari, the same Rule explicitly states that such considerations are not controlling and do not limit the Court's discretion. *See also, Beaulieu v. United States*, 497 US 1038 (1990) (White, J., dissenting) ("[I]t also regularly happens that certiorari is denied in . . . cases presenting the kinds of conflicts singled out by Rule 10"). Former Justice Byron White noted that among the grounds for denying certiorari in such instances is that "the conflict is 'tolerable' or 'narrow,' or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue." *Id.*

As it happens, this Court has already denied a recent petition for certiorari in *Mayer*. An initial petition for certiorari was filed by the City of Atlanta, prior to the Second Circuit decision in the instant case, and denied on March 29, 1999. ___ US ___; 119 S.Ct. 1334. Following the Second Circuit decision, the City of Atlanta petitioned for a rehearing. This Court denied that motion on May 24, 1999. ___ US ___; 119 S. Ct. 1799. Thus, this Court has already determined that the split between the Second and Eleventh Circuits, on the issue of whether the exemption if § 14501(c) applies to municipalities, is not in itself sufficient reason for review.

Petitioners point to no subsequent developments that should cause this Court to change its mind.[4]

B. THROUGHOUT THIS LITIGATION, PETITIONERS HAVE CONSISTENTLY FAILED TO DEMONSTRATE THAT THE CITY'S REGULATORY PROVISIONS DESIGNED TO ELIMINATE "ACCIDENT CHASING" GO BEYOND THE SCOPE OF THE SAFETY EXEMPTION OF § 14501(c).

Petitioners make the conclusory assertion that the City's provisions governing nonconsensual towing are merely "cloaked as a safety regulation" designed to prevent "accident chasing," the practice by towers of rushing to be the first at the scene of an accident in order to compete for business. Pet. at 10. Neither in their papers below nor in their instant Petition do petitioners refute the City's assertion that chasing poses a serious public hazard. Instead, they complain that "[u]nder the express terms of the City's ordinance, members of the public may never call upon their own tower to respond to the accident." Pet. at 10. This argument fails to acknowledge the hazards that result if the removal of a disabled vehicle from an accident site becomes a private matter

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[4] Of the towing cases cited by petitioners as pending in other circuits (Pet. at 7-8), the only one so far to have produced a court of appeals decision is *Cardinal Towing & Auto Repair, Inc. et al. v. City of Buford Texas, et al.*, 1999 U.S. App. LEXIS 16865. The Fifth Circuit there held that the contract between the defendant municipality and an individual tower "does not constitute a law, regulation, or provision having the force and effect of law under section 14501(c)." *Id* at 9. This holding has no bearing on the split between the Second and Eleventh Circuits over the alleged preemption of municipal provisions that do have the effect of law.

between and the vehicle's owner and a tower. Only by a comprehensive system such as DARP can the City ensure the quick removal of disabled vehicles from the streets and control the threat to public safey that such vehicles pose.

Moreover, petitioners's contention that Congress's purpose was to maximize competition even with regard to nonconsensual towing (Pet. at 10-11) is rendered absurd by the express exemption contained in § 14501(c(2)(C). That provision authorizes the State to regulate "the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

Throughout this litigation, plaintiffs have failed entirely to demonstrate that the provisions governing DARP and ROTOW extend beyond the scope of safety regulation. Their contention that these programs violate the Congressional mandate by unduly limiting competition is therefore without basis.

C. THE CITY'S PROVISIONS GOVERNING NONCONSENSUAL TOWING RELATE TO SITUATIONS IN WHICH TOWING IS REQUIRED FOLLOWING AN ACCIDENT. THESE PROVISIONS ARE DIRECTED AT SAFETY HAZARDS THAT ARISE FROM THE NEED FOR TOWING AND NOT FROM ANY OTHER ASPECT OF THE PRECIPITATING ACCIDENT. THE ONLY RELEVANT MEASURE OF THE SEVERITY OF THE ACCIDENT IS WHETHER IT RESULTS IN A VEHICLE HAVING TO BE TOWED. PETITIONERS' ASSERTION THAT THE CITY VIOLATES A PROPERTY RIGHT BY FAILING TO CONSIDER THE "SIZE OR SEVERITY" OF THE ACCIDENT IS, THEREFORE, WITHOUT BASIS.

Similarly unavailing is petitioners' contention that the City's towing scheme violates a property right created by Congress. Pet. at 11. Petitioners concede that the City "may have a limited right to control the price of nonconsensual towing, which might also include the right to select and dispatch tow trucks to respond to emergency situations." Pet. at 11. But they object to the City's "unlimited control over all towing following an accident, without regard to the accident's size or severity." Pet. at 11.

For the purposes of this case, the only relevant measure of the "size or severity" of an accident is whether the mishap results in a vehicle having to be towed. Absent regulation, a vehicle disabled in a minor accident creates no less of a chasing hazard than a vehicle destroyed in a major crash.

So long as the City's towing ordinances are reasonably aimed at preserving safety, they fall within the federal

exemption and may not be deemed to violate a property right. Neither on this issue nor any other should certiorari be granted in this case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, WITH COSTS.

Respectfully submitted,

MICHAEL D. HESS,
Corporation Counsel
of the City of New York,
Attorney for Respondents.

August 19, 1999

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
ROBIN BINDER,
MORDECAI NEWMAN,
of Counsel.

*Attorney of Record